

**IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA**

(1) JEFFREY T. McCORMICK, Individually )  
and as Class Representative, )  
  )  
  )  
Plaintiff,                                 )      **Case No. 12-CV-00215-R**  
  )  
  )  
v.    )  
  )  
(2) REMINGTON ARMS COMPANY, INC.     )  
and    )  
(3) SPORTING GOODS PROPERTIES, INC., )  
  )  
Defendants.                                )

**PLAINTIFF'S MOTION TO ALTER OR AMEND JUDGMENT**

Plaintiff, Jeffrey T. McCormick, individually ("McCormick"), respectfully moves the Court to modify its September 4, 2012 Order [Doc No. 20] and to alter or amend the Judgment entered September 4, 2012 [Doc. No. 21] pursuant to Fed. R. Civ. P. 59(e).

**RELIEF REQUESTED**

McCormick requests the Court: 1) Modify its Order [Doc. No. 20]; 2) Vacate, alter or amend its Judgment [Doc. No. 21] to allow Plaintiff to file an Amended Complaint.

In support of its Motion, McCormick incorporates by reference the arguments and authorities stated in the previously filed: 1) *Defendant Remington Arms Company's Motion to Dismiss Combined With Memorandum of Law in Support of its Motion to Dismiss* [Doc. No. 14]; *Plaintiff's Objection to Defendant Remington Arms Company's Motion to Dismiss* [Doc. No. 16]; and *Defendants' Reply Brief in Support of Motion to Dismiss Complaint* [Doc. No. 19]. In this Motion McCormick does not seek to regargue

the positions previously presented to the Court. McCormick does seek the right to file an Amended Complaint.

### **ARGUMENT AND AUTHORITY**

McCormick claims present, significant, consumer safety issues for all purchasers and owners of Rifles which contain the Walker fire control. Because Rifles which contain the Walker fire control may fire before the trigger is pulled, serious injury or death can result from the Walker fire control defect. Under a breach of warranty theory, the breach of the implied warranty occurs at the time of sale to the Rifle owner. Similarly, and particularly in this case in which personal safety is jeopardized by the Walker fire control, manifestation of the defect (the Walker fire control) occurs at the time of sale. The Uniform Commercial Code provisions for implied warranties of merchantability will not be served if Rifle owners must wait for their Rifles to fire without a trigger pull before their claim accrues.

Rifles which fire unexpectedly may kill or injure. Thus claims based on implied warranties for bolt action high-powered Rifles are different from claims arising from: sales of baby cribs (*O'Neil v. Simplicity, Inc.*, 574 F.3d 501 (8<sup>th</sup> Cir. 2009); “wet or dry” plumbing defects (*In re Zurn Pex Plumbing Products Liability Litigation*, 664 F.3d 604 (8<sup>th</sup> Cir. 2011); or car parts (*Briehl v. General Motors Corp.*, 172 F.3d 623 (8<sup>th</sup> Cir. 1999).

In asking this Court to modify its Order [Doc. No. 20] and to vacate, alter or amend its Judgment [Doc. No. 21], McCormick understands the challenge facing the Court: to follow existing implied warranty law and apply it to a uniquely dangerous

product. McCormick's allegations are not just the Rifles may fail to operate properly because of the Walker fire control. McCormick has attempted to allege in his Complaint [Doc. No. 1] the Walker fire control contained in every Rifle is defective and thus each Rifle breaches the implied warranty of merchantability. McCormick submits for the Court's consideration, that *Zurn*, 664 F.3d 604 provides authority to conclude the allegedly defective part is the manifestation of defect.

This Court is aware of its authority to dismiss a case with or without leave to amend. *Glenn v. First National Bank in Grand Junction*, 868 F.2d 368 (10<sup>th</sup> Cir. 1989); *Brever v. Rockwell Int'l Corp.*, 40 F.3d 1119 (10<sup>th</sup> Cir. 1994). As the Court in *Brever* stated:

“Ideally, if it is at all possible that the party against whom the dismissal is directed can correct the defect in the pleading or state a claim for relief, the court should dismiss with leave to amend.” 6 C. Wright & A. Miller, *Federal Practice & Procedure*, §1483, at 587 (2d ed. 1990); *see also United States v. McGee*, 993 F.2d 184, 187 (9<sup>th</sup> Cir. 1993).

### **CONCLUSION**

The Court's Order [Doc. No. 20] and Judgment [Doc. No. 21] dismiss McCormick's case and renders judgment without leave to amend. McCormick moves the Court to modify its Order and vacate, alter or amend its Judgment to allow McCormick to file an Amended Complaint.

Respectfully submitted,

By: /s/Steven J. Adams

Steven J. Adams, OBA No. 142 /  
Idaho Bar No. 7935  
Fellers, Snider, Blankenship,  
Bailey & Tippens, P.C.  
The Kennedy Building  
321 South Boston Ave., Suite 800  
Tulsa, Oklahoma 74103-3318  
Telephone: (918) 925-5835  
Facsimile: (918) 583-9659  
[sadams@fellerssnider.com](mailto:sadams@fellerssnider.com)

and

Max C. Tuepker, OBA No. 9117  
**MAX C. TUEPKER, PC**  
1322 N. Walker Avenue  
Oklahoma City, OK 73103  
Telephone: (405) 235-1700  
Facsimile: (405) 235-1714  
[mtuepker@tuepker.com](mailto:mtuepker@tuepker.com)

and

Timothy W. Monsees, MO No. 31004  
**MONSEES, MILLER, MAYER,  
PRESLEY & AMICK**  
A Professional Corporation  
4717 Grand Avenue, Suite 820  
Kansas City, MO 64112  
Telephone: (816) 361-5550  
Facsimile : (816) 361-5577  
[tmonsees@MMMPALAW.COM](mailto:tmonsees@MMMPALAW.COM)

and

Richard A. Ramler, MT No. 2256

**RAMLER LAW OFFICE**

202 West Madison Avenue

Belgrade, Montana 59714

Telephone: (406) 388-0150

Facsimile : (406) 388-6842

RichardRamler@aol.com

**ATTORNEYS FOR PLAINTIFF**

**CERTIFICATE OF SERVICE**

This is to certify that on the 2<sup>nd</sup> day of October, 2012, I electronically transmitted the foregoing document to the Clerk of Court using the ECF system for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

Dale G. Willis - [dwills@smbtrials.com](mailto:dwills@smbtrials.com)

Robert H. Alexander, Jr. - [alexattys@productlaw.com](mailto:alexattys@productlaw.com)

John J. Love - [jjl@productlaw.com](mailto:jjl@productlaw.com)

Robert W. Ivy - [rwi@productlaw.com](mailto:rwi@productlaw.com)

*/s/Steven J. Adams* \_\_\_\_\_